Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/17976/2016
HU/17978/2016

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 13th August 2018	**On 21st November 2018**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

KTMM
SM
(anonymity direction made)

Appellants

And

The Secretary of State for the Home Department

Respondent

For the Appellants: **-**
For the Respondent: **Mr A.McVeety, Senior Home Office Presenting Officer**

DETERMINATION AND REASONS

1. The Appellants are both nationals of Malawi. They are husband and wife.

2. On the 23rd May 2018 the First-tier Tribunal dismissed, in two separate decisions, the appeals of both Appellants. The First-tier Tribunal also dismissed, on the same day, the appeals of both of the Appellants' adult sons. By my

decision dated 24th May 2018 I set all four decisions aside. The decisions in the appeals relating to the Appellants' sons were re-made, and the appeals allowed with reference to paragraph 276ADE(1)(v) of the Immigration Rules. This is the 're-made' decision in respect of the Appellants. Their appeals are brought on human rights (Article 8) grounds only.

Anonymity Order

3. The appeal turns in part on medical evidence. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

> "Unless and until a tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify any of the Appellants or any member of their family. This direction applies to, amongst others, both the Appellants and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Factual Matrix

4. The First Appellant was born in Malawi in 1986. She came to the UK in December 2002 in possession of a valid student visa. She has therefore lived in this country for approaching 16 years. She thereafter varied that leave so as to extend it, but it is common ground that she has been without leave to remain in the UK since 30th November 2003.

5. The First Appellant was diagnosed as HIV+ shortly in 2003, after her arrival. She had not been aware that she carried the virus before she came here. She has been receiving anti-retrovirals from the NHS ever since: her current prescription is for 'Triumeq', a triple-combination therapy. She suffers from various medical issues all connected to her HIV infection. She has had her gall bladder removed, she was recently admitted to hospital with problems with her liver/pancreas, has hypertension and lupus. She also suffers from chronic digestive problems including a hernia and intense heartburn. She is currently waiting for an operation to have the hernia removed. Notwithstanding these personal difficulties she has managed to work for 12 years in this country. She worked as a care assistant but stopped when advised that she did not have permission to do so from the Home Office. She told me at hearing that she would resume that work if she was given permission, her health permitting. As far as her mental health is concerned she has been diagnosed with depression. She was prescribed anti-depressants but these were withdrawn due to side effects. She has continued to receive talking therapies. She attends counselling

and receives additional support from the church that she worships at in Glasgow.

6. The First Appellant has a brother in this country who is a British citizen. He lives in Glasgow. He long-term sick and is now unable to work. He receives benefits as a result and he gives some of his income to the Appellant. She helps him out by doing housework and cooking for him. She describes their relationship as close, particularly since he has fallen out with his own children: he has come to rely on her. He in turn has always supported her. I have been sent a letter by this brother who confirms that he suffers from serious spinal stenosis. He states that his sister and her family are a "cornerstone" to him and that if they were to leave the United Kingdom it would affect him psychologically. He suggests that he might face mental breakdown, and points out that this would create an additional burden for the NHS. He expresses his concern for his nephews and states that they have always lived as a close family unit. As well as helping her brother out the Appellant volunteers at her local church and for a care organisation in Glasgow.

7. The First Appellant told me that she has a sister who lives in Blantyre in Malawi. Although they have not seen each other since 2002 they have remained in contact by telephone and more recently using social medias such as 'whatsapp' – for instance she called the Appellant the other day to ask how she got on in hospital. She and her husband both work but the Appellant does not think that they would be able to offer her and her husband any significant support since she has 5 children of her own who are all still in full-time education.

8. The Second Appellant was born in Malawi in 1974. He arrived in this country in July 2004 with leave to enter as a visitor; that leave was subsequently varied and he was given leave to remain as a student until 2008. He is a chemistry graduate and as a student here undertook a Masters degree. He overstayed that visa and has had no basis to remain in this country since then. He has been here 14 years. He worked for 8 of those years as a care assistant but like his wife was forced to give up that employment when it came to light that he did not have permission to work. He is currently supported by the state (section 4) and his brother-in-law helps them out. He volunteers at his local church and through his work with 'Waverley Care' he has been delegated to attend meetings of 'HIV Scotland – National Involvement Standards (HIV) to help in implementing policies for people in Scotland living with HIV.

9. The Second Appellant is HIV+. It appears from his medical notes that this was diagnosed in 2006. He is prescribed anti-retrovirals: Kivexa and Efavirenz. He continues to have a number of serious medical complaints. On the 4th February this year he suffered a heart attack. He was taken by ambulance to hospital where he underwent emergency surgery and a stent was inserted. He has been advised that he will be on 'heart failure medication' for the rest of his life. He

is currently attending a specialist cardiac clinic at Glasgow Infirmary every four weeks and his HIV consultant has planned a review of his medication regime in light of the heart attack. I have before me a letter from Dr S MacKenzie, the family GP. Dr MacKenzie confirms that the Second Appellant has a moderate degree of heart failure following his myocardial infarction. He has been placed on medication to improve his prognosis and limit the likelihood of further heart attack. If these medications were to be stopped abruptly the risk would increase. Likewise any break in his anti-retroviral medication would increase the chance of a further heart attack.

10. The Second Appellant also has a sister in Blantyre. She is married with four children and although he has maintained contact with her, she would not be in a position to assist him: he told me that she has four children of her own and also cares for their nephew who was orphaned.

11. The Appellants' sons, now aged 24 and 22, have both lived in the United Kingdom since 2005. This Tribunal has determined that both sons meet the requirements of the rules so that they should be granted leave on 'private life' grounds. At the date of the resumed hearings the Appellants' sons had not been granted any leave pursuant to my earlier decision, but Mr McVeety was able to indicate that the Secretary of State had not appealed my decision. Before me the Appellants stated that it was worry about their sons which gave them greatest cause for concern. The boys still live at home with them and have not yet embarked on independent lives. The First Appellant spoke movingly about her wish to be able to remain with her children. Although they are technically adults they still have a lot to learn about life; she believes that they still need her guidance and support. However she also candidly admitted that this care and support goes both ways: she is fearful that if returned to Malawi her and her husband would face their declining age and health without the support of their sons. They are the ones who understand their parents' needs best, since they have grown up with, and always known about, their various conditions. The Second Appellant also expresses great concern about the prospect of family break-up. He believes that the trauma of separation would have a very negative impact upon him and his wife as well as the boys, and is concerned about his own ability to cope with it, in light of his heart issues.

12. The boys themselves have written in support of their parents' cases. Their son K writes that he would be "devastated" if he were to be separated from them: "we have been through a lot as a family, and we have relied upon each other throughout this difficult journey". He agrees with his mother's assessment that he still needs her help transitioning into adulthood. The whole situation is incredibly stressful for the whole family and he desperately hopes that they will be allowed to stay so that they can continue to guide him and his brother as they embark upon their adult lives.

13. Both Appellants speak Chichewa, a language widely spoken in Malawi and admit to being familiar with the culture and norms of that country. They both candidly admit that they have close family members there and that they would be happy to see them again. This is however a factor that is outweighed, in their minds, by their fear that they would not be able to access the medication they both require to manage their complex medical needs. The Appellants' real fear is that they will become sick and infirm and their sons will not be there to assist them.

14. I have been sent a number of letters in support of the Appellants' appeals. These uniformly speak of the Appellants in warm terms, and attest to their community involvement. I summarise the most significant of these below: I intend no disrespect to the authors who I have not referred to.

15. A Mr 'EM' of Leven is a university friend of the Second Appellant. He writes that his family are close to the Appellants and see them regularly. He describes the Appellants as hardworking and warm. To his knowledge they volunteer for a number of organisations in Scotland and have good friends in Dundee and Fife as well as Glasgow. They have been a great source of personal support to him. His wife has been battling mental illness for some time and has twice been hospitalised in the last 4 years, for periods of between 2-3 months. During these periods the Appellants have stepped in and assisted Mr EM by looking after his children and provided him with an "amazing" amount of emotional support.

16. Pastor Philip Everitt of the Destiny Church in Glasgow confirms that the Appellants are part of his congregation. He writes that the Second Appellant has had various voluntary roles within the church and that the First Appellant has also helped out by running kids' groups and helping numerous young mothers. Both have recently been "instrumental" in helping one young family who have tragically lost their father. Pastor Everitt describes the assistance offered by the Appellants to the grieving mother – taking the children to school, looking after them and putting food on their table – as the "act of heroes". The Children's Pastor Ilona Witoszek confirms this and describes the First Appellant as a "great asset" for the community in Glasgow. A Mrs Gertrude Kadzuwa, a member of the same church, speaks of the First Appellant in similarly glowing terms but also speaks to her mental health issues: Mrs Kadzuwa runs counselling sessions at the church as well as bible study groups and expresses concern about the First Appellant's emotional and psychological wellbeing.

17. Ms Mariegold Akomode, Support and Outreach Co-ordinator for 'Waverley Care' has written to confirm that the First Appellant has been receiving the support of that organisation since 2011, to help her deal with her HIV diagnosis but more particularly with her depression. The First Appellant has, under the auspices of Waverley Care, engaged with community integration projects. She provides babysitting and care for other mums, she teaches children at Sunday

school and has befriended a number of elderly people suffering from dementia. She remains an active member of the 'Waverley Care' team. The Second Appellant is an active member of the Service Users Involvement team. He is involved in planning, organising and contributing to meetings and policy planning and like his wife volunteers in the community integration projects.

18. Neither party provided me with any particularly up to date evidence about the availability of drugs in Malawi. Mr McVeety relied on information provided in the refusal letter. This cites a report by AIDS charity 'AVERT', who state that the Malawian government has shown a strong commitment to providing ARVs, with almost 200,000 citizens receiving prescriptions by 2009. The same report acknowledges that this programme is not without its difficulties. There is a shortage of medical workers to administer treatment. The drugs themselves are relatively old and buying more developed therapies will be more expensive, meaning that less people will be able to get them. Even in areas where ARVs are available, food shortages have raised other issues, with the confluence of HIV infection and lack of nutrition causing particular concern. There is commonly a lack of medicines to treat the opportunistic infections that arise at later stages of HIV infection. Other reports cited in the refusal letter discuss the dilemma faced by the Malawian government, who faced a tripling in costs with the introduction of new-line therapies. The infection rate in Malawi stood at 11% in 2011. Medicins Sans Frontieres 2012 report congratulates the Malawian government for its progress but expresses concern that the ARV programme is entirely donor-funded. The Secretary of State points to evidence that the particular drugs taken by the Appellants are available in Malawi. The Appellants bundles contain newspaper reports from 2013-2017 discussing the acute shortage of drugs, healthcare workers and medical supplies faced by Malawian hospitals. These articles do not refer explicitly to ARVs, but rather to basic items such as swabs and syringes. Where drugs are in short supply there have been cases of doctors requiring an additional 'fee' – payable over and above the actual cost – in order to dispense them.

Legal Framework

19. The applicable rule relating to 'private life' under Article 8 is paragraph 276ADE(1). It is common ground that the only part of that rule that could possibly avail the Appellants is sub-paragraph (vi):

> (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.

20. That test contains three limbs. It is agreed that the Appellants meet the first two: they are both aged over 18 years and have lived in this country for less than 20 years. The third limb, whether there are "very significant obstacles to integration" has been described by the Upper Tribunal as a "stringent" test: see Bossade (ss.117A-D-interrelationship with Rules) [2015] UKUT 415 (IAC). In Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813 Lord Justice Sales described it in the following terms:

> "In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life".

21. In his own guidance, published to coincide with the introduction of this version of the rule, the Secretary of State focuses on the extent to which it would be possible for the individual concerned to enjoy a private life in the country of destination. The presumption should be that integration will be possible, and it is for the applicant to introduce evidence to demonstrate that it is not. A number of factors can be considered, for instance linguistic, familial, cultural and social ties to the destination country:

> A very significant obstacle to integration means something which would prevent or seriously inhibit the applicant from integrating into the country of return. The decision maker is looking for more than obstacles. They are looking to see whether there are "very significant" obstacles, which is a high threshold. Very significant obstacles will exist where the applicant demonstrates that they would be unable to establish a private life in the country of return, or where establishing a private life in the country of return would entail very serious hardship for the applicant.

From *Appendix FM 1.0 Family Life (as a Partner or Parent) and Private Life: 10-Year Routes* August 2015.

22. Mr McVeety accepted that if I could not be satisfied that there were "very significant obstacles to integration" it would nonetheless be open to me to allow the appeal with reference to Article 8 'outside of the rules'. He acknowledged that the rule, with its exclusive focus on the prospects of life in Malawi, left open the question of the weight to be attached to the Appellants' Article 8 rights as they are exercised in *this* country. In the cases of the Appellants this included their relationships with close friends in Scotland, and importantly, their relationships with their sons. Given that the boys still live at home, and have not embarked on independent lives, Mr McVeety accepted that these relationships fell within the rubric of 'family' rather than simply 'private' life. He therefore invited me to make my own assessment of proportionality, attaching appropriate weight to the public interest in maintaining immigration control and the other factors identified in s117B of the Nationality, Immigration and Asylum Act 2002.

Discussion and Findings

23. I find that each Appellant before me has established both a family and private life in the United Kingdom. Although their sons have both passed the age of majority, I accept, as did Mr McVeety, that there is no 'bright line' between childhood and adulthood, and that where young adults remain in the family home they may continue to be emotionally, financially and practically dependent upon their parents until such time as they are ready to embark on independent lives. The relationship between parents and sons continues to be a 'family life'. I accept that the Appellants are both hardworking and sociable people who have, through their friendships, membership of the church and voluntary work, actively contributed to the community in Scotland, as well as creating valuable private lives of their own.

24. I accept that the decisions to refuse them leave would in due course lead to their removal from the United Kingdom and that this removal would constitute an interference with their Article 8 rights. I therefore find Article 8 to be engaged on the facts of the case, bearing in mind the relatively low threshold for engagement (see for instance Boultif v Switzerland (2001) 33 EHRR [at 3940], AG (Eritrea) v Secretary of State for the Home Department [2007] EWCA Civ 801 [at 28]).

25. The decisions were lawful in that the Secretary of State has the power to take them, and I accept that they are rationally connected with the legitimate aim of protecting the economy.

26. The question remains whether the decisions are proportionate.

27. I begin my assessment of proportionality with an assessment of the applicable rule, paragraph 276ADE(1)(vi).

28. The Appellants have been honest and open with me about the extent to their ties to their country of origin. Both speak Chichewa, so there is no linguistic barrier to integration. Both grew up in Malawi and remain familiar with that country's culture and social norms. Whilst I accept that Malawi will have changed in the 15 years or so since the Appellants left, there are no obvious social barriers to their understanding or ability to 'fit-in'. Both Appellants have retained contact with their siblings who live in Blantyre. It is clear, applying the test as it was perceived by Lord Justice Sales in Kamara, that each Appellant would be enough of an "insider" to be able to operate on a day-to-day basis in Malawi; it is likely that in a reasonable period of time they will be able to establish new friendships and other relationships capable of constituting a private life. That remains the case whatever difficulties and hardships they might face in obtaining treatment for their various medical conditions. I therefore consider that the test under the rules is not met. I am nonetheless satisfied that it is appropriate to go on to consider Article 8 'outside the rules'. That is because there are two important facets of the Appellants' case that lie outwith the bounds of consideration in 276ADE(1)(vi): the impact on the Appellant's health (physical and mental) and the rupture in their existing relationships.

29. In my assessment of whether the decision to refuse leave is an unlawful breach of Article 8 'outside of the rules' I must have regard to the public interest, in particular those factors set down in s117B of the 2002 Act.

30. The maintenance of immigration control is in the public interest. Neither Appellant has had leave to remain in this country for some time. Both are educated and intelligent people and knew full well that they were acting unlawfully when they chose to remain in this country when their visas expired in, respectively, 2003 and 2008. That is a long time to be an overstayer. They could have chosen to leave at any time. That they did not weighs heavily in the balance against them, and I recognise that it is strongly in the public interest to maintain immigration control. Neither Appellant currently qualifies for leave to remain 'within the Rules'. That is a matter that weighs heavily against them in the balancing exercise.

31. Neither Appellant is financially independent. I accept that they have both worked and supported their family, and that given the opportunity would do so again, but I must bear in mind that at present they are wholly dependent upon the state, either directly through 'section 4' payments or via the Second Appellant's brother, himself in receipt of state benefits. This is a matter that must weigh against them in the balancing exercise.

32. Both Appellants speak fluent English and this is not therefore a factor that weighs against them. Nor is it, however, a matter that can add weight to their side of the scales.

33. I accept that the family life that the Appellants seek to preserve, and that which they share with each other, existed before the family came to the United Kingdom and to that extent s117(4) has no application.

34. I am satisfied that the Appellants each enjoy a significant private life outside of the home. I have no reason to doubt the evidence of the various church members, charity workers, volunteers and family friends who have written to the Tribunal in support of the Appellants. I accept that they play an active role in their local church and that they also contribute to the community in Scotland by their work in a HIV charity. I note that the Appellants are close to the Second Appellant's brother who depends upon her for company and practical support, since he is on long-term sick leave from work with back problems and is now, he says, unable to perform basic tasks such as housework himself. I have taken into account the evidence that the Appellants have a number of long-term and close friendships that could not easily be replicated. I must however attach only little weight to these factors, since this is a private life established when the Appellants residence in this country was either precarious, or latterly unlawful.

35. Section 117B(6) has no current relevance to this application since neither Appellant has a genuine and subsisting parental relationship with a child. I do however note that from at least 2012 to 2013 they arguably met the requirements of this provision, since the boys were then 'qualifying', that is to say they had lived in the United Kingdom for a continual period of seven years. On the facts it is hard to say that it would have been reasonable for them to leave at that time, given their long residence, the terms of the Respondent's policy and the health concerns of their parents. I therefore find that at least at that time it would not have been in the public interest for the Appellants to be removed from the United Kingdom. I attach only minimal weight to this factor.

36. There is in this case one obvious and important additional facet of the public interest in refusing the Appellants leave. That is that the Appellants are both receiving extensive medical treatment on the NHS. The Appellants are both infected with the HIV virus and that this leads to numerous complications and health complaints. The First Appellant has very recently suffered a serious heart attack and is now receiving treatment for heart failure. The Second Appellant has various intestinal problems and lupus. I find that both have been a drain on the public purse for a number of years, and that this burden will only increase as they get older, and their conditions deteriorate, as I think it is accepted, they must. I have not been provided with estimates of the cost, but it is likely to be substantial. I have weighed that in the balance against the Appellants.

37. Against these public interest factors, I weigh those matters that go to the Appellants' case that it would be unjustifiably harsh to remove them from this country.

38. I am satisfied that the Appellants and their sons enjoy a close and supportive relationship that, as Mr McVeety acknowledges, could properly be described as a 'family life'. Like any family the boys look to their parents for support and guidance, whilst their parents look to their children for security and assistance in the future. Unlike other families, however, this is a family whose bonds have been strengthened by necessity, since they have, over a long period, endured two very stressful challenges: insecure immigration status, and living with HIV.

39. As to the first of these challenges, the blame for that must lie squarely with the adult Appellants before me in this appeal (see above at §30). That blame cannot, however, rationally be attached to their sons, who were young boys when they arrived to join their parents in 2005. I doubt that either had any notion of what immigration status was, or when it expired. Although they clearly did have an understanding of their situation once they had reached majority I accept that since that time they were waiting for a decision from the Home Office (they made their applications for leave to remain in 2014) and subsequently for the outcome of their appeals. I have therefore borne in mind that insofar as the Respondent's decisions in the instant appeals impact upon the family life of the Appellants' sons, that is a matter that can properly be given weight in the proportionality balancing exercise. These young men have built their lives in this country to the extent that their right to remain here is recognised under the Immigration Rules. The removal of their parents presents them with an unpalatable choice. Leave behind their friends, education, prospects and entrenched private lives, or allow their terminally ill parents to return to Malawi alone.

40. As to the HIV infection of the Appellants, I accept that this is a matter that has weighed heavily on each member of the family. It has resulted in regular crises, such as the First Appellant's recent heart attack. It has given all of them a significant degree of stress, and has resulted in the Second Appellant's long-term anxiety and depression. I have no hesitation in accepting that all of the family feel very worried and frightened about what might happen to the Appellants should they be forced to return to Malawi. It has further strengthened the already solid bond between sons and parents.

41. Had the boys embarked on independent lives I would have been satisfied that the decisions to refuse the Appellants leave would have been proportionate. That is not however the situation. They are both still living at home, and are in full time education. They remain dependent upon their parents. I am therefore satisfied that the detriment to them of their parents leaving would be immediate and significant. The shock of being thrust into the adult world would however be of little consequence compared to the anxiety that they would likely experience about their parents returning to Malawi. I accept Mr McVeety's submission (made in reliance on the information in the refusal letter) that at least one of the ARV drugs taken by each Appellant is available in

Malawi. What is less clear is whether they are readily available in the same combination therapy format as the Appellants currently take. The objective material speaks of regular shortages and interruptions in the supply of all medications, of a lack of trained staff and equipment. I have already rejected the Appellants' case that their removal would place the United Kingdom in breach of its obligations under Article 3 ECHR, but I accept that there is a real likelihood that their conditions would deteriorate if their medical treatment – for all conditions – is interrupted by removal. I accept that this will be extremely difficult for the Appellants' sons to deal, both psychologically and practically. This is a single composite family unit of which two members qualify for leave to remain in this country. On the facts I am persuaded that it would be unjustifiably harsh for the remaining two to be removed.

Decisions

42. The decisions of the First-tier Tribunal have been set aside.

43. I re-make the decisions in the appeals as follows: "the appeals are allowed".

44. There is a direction for anonymity.

Upper Tribunal Judge Bruce
24th September 2018